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Before the
Federal Communications Commission
Washington, D.C. 20554

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CC Docket No. 93-107

DISPATCHED BY

In the Matter of

Clark-Bader, Inc., d/b/a
TMC Long Distance
Complainant,

v.

File No. E-89-85

Pacific Bell,
Defendant.

HEARING DESIGNATION ORDER

Adopted: June 1, 1993;

Released: June 23, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we designate the above-captioned complaint proceeding for hearing to resolve material questions of fact surrounding Pacific Bell's ("Pacific's") provision of interstate access services to Clark-Bader, Inc., d/b/a TMC Long Distance ("TMC") during the period from 1985 through 1988. The issues to be decided in this Section 208 complaint proceeding¹ are whether Pacific's actions, policies and practices in providing the services complained of violated Sections 201(b)² and 202(a)³ of the Communications Act, and if so, whether TMC suffered any measurable harm as a consequence of such violations.⁴ As discussed below, we are unable to resolve substantial questions of fact raised by the parties that are essential to a determination in this proceeding. An evidentiary hearing will provide both TMC and Pacific a full opportunity to establish a record upon which a decision can be made.

¹ See 47 U.S.C. § 208.

² 47 U.S.C. § 201(b). This Section states that "[a]ll charges practices, classifications, and regulations for and in connection with [interstate] communication service shall be just and reasonable"

³ 47 U.S.C. § 202(a). This section makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service"

⁴ The Commission recently affirmed its discretion (and its staff's pursuant to delegated authority) to conduct bifurcated complaint proceedings, "either by bifurcating discovery itself, or by bifurcating [its] action into liability and damages phases." Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, FCC 93-131, paras. 34-35, FCC Rcd (1993). Whether bifurcation is appropriate in this proceeding is a mat-

II. BACKGROUND

2. TMC filed its complaint in February 1989 alleging, *inter alia*, that Pacific had violated Sections 201(b) and 202(a) of the Act by failing to provide equal access for TMC's competitive long distance services in the San Diego area. On March 31, 1989, Pacific filed an answer and motion to dismiss in which it disputes the legal and factual bases of TMC's claims. Both parties have since filed numerous pleadings and related motions in which the facts and circumstances surrounding Pacific's provision and TMC's taking of the access services are sharply disputed. In addition, the parties have undertaken substantial discovery, including interrogatories, document requests and witness depositions, directed at the identification and production of evidence to support their respective claims.⁵

3. The crux of TMC's complaint is its claim that a defectively engineered equal access tandem switch installed by Pacific in the San Diego area caused TMC's customers to experience severe and repeated disruptions of service, such as blocked calls and excessive post-dial delay.⁶ According to TMC, Pacific was well aware of the problems TMC's end-users were experiencing due to the defective access tandem but willfully and intentionally refused to take prompt corrective actions. TMC alleges that through Pacific's actions and inactions, it was denied access services equal to those Pacific readily provides to TMC's competitors such as AT&T, MCI and U S Sprint.⁷ TMC claims that Pacific could have quickly addressed TMC's problems by offering direct trunking service that would have avoided switching at the defective access tandem but made no reasonable effort to do so.⁸ Pacific's actions, TMC alleges, violated the prohibition against 80 unjust, unreasonable practices and unlawful discrimination contained in Sections 201(b) and 202(a) of the Act.⁹ TMC seeks a Commission order directing Pacific to pay monetary damages, plus accumulated interest, for what it describes as the harm to TMC's business, competitive position and growth potential allegedly suffered as a direct result of Pacific's unlawful actions.¹⁰

4. Pacific admits that its access tandem switch in the San Diego area malfunctioned during the period covered by the complaint.¹¹ It contends, however, that TMC has greatly exaggerated the difficulties it experienced and misstated Pacific's actions and obligations under the Communications Act and the terms of its tariff.¹² Pacific concedes that TMC could have obtained direct trunking service and avoided the difficulties TMC claims its customers exper-

ter properly left to the discretion of the Presiding Judge.

⁵ The record reflects that the parties have already resulted to numerous written interrogatories, exchanged thousands of pages of documents and obtained the deposition testimony of at least six potential witnesses.

⁶ TMC Complaint at 3-9.

⁷ *Id.* at 8-9.

⁸ *Id.*

⁹ *Id.*

¹⁰ TMC submitted with its complaint a list purporting to show its former customers who allegedly cancelled service orders with TMC due to problems with Pacific's tandem switch. See TMC Complaint, Exhibit B. During discovery, TMC produced documents which it claims support Exhibit B. See TMC Answer to Interrogatories, dated July 3, 1989.

¹¹ Answer at 24-28.

¹² *Id.* at 9-17.

ienced as a result of the defective access tandem. Pacific states, however, that direct trunking service is described in detail in Pacific's access tariffs and alleges that it repeatedly advised TMC of this service alternative.¹³ Pacific contends that given the extent of the customer difficulties and dissatisfaction TMC has alleged in its complaint, TMC has offered no credible explanation for its failure to order direct trunking service.¹⁴ Pacific contends, that in any event, TMC has failed to present any facts that would establish that Pacific's actions were the cause of any harm allegedly suffered by TMC during the period in question.¹⁵ With regard to TMC's discrimination claims, Pacific states that all interexchange carriers ("ICs") operating in the San Diego area during the period covered by TMC's complaint had traffic switched at the access tandem. Pacific argues that no discrimination occurred because to the extent TMC experienced difficulties with the switch, so did all other ICs.¹⁶

5. The principal factual dispute in this matter centers around Pacific's defense that TMC has failed to show that Pacific acted in an unreasonable manner or establish any causal connection between Pacific's actions and the harm that TMC alleges it suffered during the period covered by the complaint. Both TMC and Pacific have pending motions for extraordinary discovery¹⁷ in which they seek to depose a number of witnesses which they claim have first-hand knowledge of the facts and circumstances surrounding the access services provided TMC and the cause and effect of the purported difficulties experienced by TMC during the 1985-1988 period.¹⁸ Although TMC and Pacific have each opposed the scope of the other's discovery requests, both have taken the position in their discovery motions and in discussions with the staff that further fact finding is necessary to resolve the issues raised by the complaint.¹⁹

III. DISCUSSION

6. Based on our review of the record adduced in this matter, we agree with the parties that further proceedings are necessary to resolve material questions of fact bearing on whether Pacific violated the just and reasonable standard of the Communications Act in connection with its provision of interstate access services to the complainant during the period described in the complaint. Even if it could be said that the record before us provides a sufficient basis to determine that Pacific's actions were unlawful as alleged, we still would be left with a substantial question of whether and to what extent TMC suffered actual harm and is entitled to an award of damages from Pacific as a consequence of Pacific's actions. In order not to delay further a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will designate this complaint proceeding, including all outstanding discovery motions and related pleadings filed in the matter, for hearing before an Administrative Law Judge on the issues of liability and damages set forth below.²⁰

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208 and 209, and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent order upon the following issues:

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 10-16. In subsequent pleadings, Pacific has alleged that its review of the customer records submitted by TMC as evidence of the harm it suffered shows that most of the customers listed either cancelled service for reasons other than service problems related to the tandem or cancelled for unknown reasons. Pacific contends that even the records that do support TMC's claims contain notations as to the reasons for cancelling in different handwriting, casting doubt on the authenticity of these records. See Motion for Order Granting Immunity for Witnesses, filed March 7, 1991.

¹⁶ *Id.* at 9-10.

¹⁷ The Commission's rules for processing formal complaints under Section 208 of the Act permit parties to initiate limited, self-executing discovery (30 single interrogatories) during the time beginning with service of the complaint and ending 30 days after a reply to the defendants' answer is due. 47 C.F.R. § 1.729. Other forms of discovery, including but not limited to the taking of depositions, production of documents and propounding additional interrogatories, are considered extraordinary and must receive prior authorization by the staff. 47 C.F.R. § 1.730.

¹⁸ TMC filed a Motion for Leave to File Notice to Take Depositions Upon Oral Examination on July 25, 1989 and a supplement to the motion on January 20, 1990. Both parties subsequently filed notices to take depositions of a number of potential witnesses. In addition, Pacific filed a Motion for Order

Granting Immunity on March 7, 1991, requesting the Commission to grant two former employees of TMC immunity from federal prosecution. TMC filed a partial opposition to the motion on March 20, 1991. Pacific claims that the two employees are prepared to testify that they were instructed by a TMC principal to falsify certain records on which TMC relied to support its complaint but are fearful of federal prosecution. We note that the Commission has specifically delegated to the Presiding Judge the authority to make the public interest determination required by 18 U.S.C. § 6004 that a grant of immunity is essential to the resolution of an adjudicatory proceeding and to request the Commission's Office of General Counsel to obtain the Attorney General's approval as required by Section 6004. See Revised Procedures for Handling Requests for Witness Immunity in Adjudicatory Proceedings, 73 FCC 2d 816 (1979). Pacific's motion for an order granting immunity and all other unresolved discovery motions and related pleadings are encompassed by the issues designated in this order and will be resolved by the Presiding Judge.

¹⁹ In this regard, we note that while neither TMC nor Pacific has formally requested that this matter be designated for hearing, both have informally advised the staff that they view a hearing as the most appropriate and expeditious way to resolve the issues raised by the complaint.

²⁰ Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

1. To determine the facts and circumstances surrounding Pacific's provision of interstate access services to TMC during the period covered by the complaint.

2. To determine whether Pacific engaged in unjust and unreasonable practices and/or charged unjust and unreasonable rates in violation of Section 201(b) of the Communications Act in connection with its provision of interstate access services to TMC during the period covered by the complaint.

3. To determine whether Pacific engaged in unjust and unreasonably discriminatory practices and/or charged unjust and unreasonably discriminatory rates in violation of Section 202(a) of the Communications Act in its provision of interstate access services to TMC during the period covered by the complaint.

4. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, Pacific should be required to pay monetary damages to TMC.

5. To determine, in view of the evidence adduced under the foregoing issues, whether TMC is entitled to an award of prejudgment interest on any damages recovered in this proceeding.²¹

8. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence shall be upon TMC.

9. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance with Section 1.221 of the Rules, 47 C.F.R. § 1.221, within twenty (20) days of the mailing of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

²¹ The Commission recently affirmed its authority to award interest in common carrier complaint cases. See *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., et al.*, 8 FCC Rcd 1224 (1993), *appeal pending sub nom.* In deciding whether to award interest in a particular common carrier complaint case, the Commission is "generally

guided by federal court practice, where the award of prejudgment interest 'is a matter left to the sound discretion of the trial court.'" *Id.* at 1229, citing *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).